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No. 03-1238

Supreme Court, U.S.
FILED
NOV 10 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IBP, Inc.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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November 10, 2004

RPI Legal Printers, Seattle, Washington

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SUPPLEMENTAL BRIEF

Respondents Alvarez, Gutierrez, Hernandez, Martinez, Moreno, and Rodriquez file this supplemental brief in response to the Petitioner's supplemental brief and the United States' *amicus* brief.

While the petition should be denied because there is not an intolerable conflict among the circuits,[1] this supplemental brief addresses (1) why review will not affect the judgment below, and (2) why, if the petition is held or granted, the stay of the mandate should be lifted so that the 815 workers can recover their state law damages that the parties and the United States agree are not affected by the petition.

REVIEW WILL NOT AFFECT THE JUDGMENT BELOW

The United States recommends against granting the petition based on Respondents' "represent[ation] to us that they will seek entry of the alternative judgment proposed by the district court and nothing more." U.S.14. IBP responds that Respondents' representation is "extraordinary," not supported by representations made to the Court of Appeals or to this Court and fundamentally inconsistent with "duties the class counsel and named plaintiffs owe to other class members." IBP Supp. Brief 4. IBP is wrong on all counts.

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[1] The United States concludes the Ninth and First Circuit cases "are capable of being reconciled on their facts." U.S. 9. IBP's supplemental brief does not dispute that conclusion. While IBP's parent (Tyson Foods) is interested in this general legal issue, the present case is not an appropriate vehicle. *See also* discussion *infra*.

Respondents told the Court of Appeals regarding the state law meal break cross-appeal that the trial court "should be reversed and judgment entered using the alternate damage finding." Resp. Supp. App. 1b.[2] Respondents told this Court that "[r]egardless of any ruling in this Court on the issues raised by IBP, the plaintiffs herein will recover all of their damages *under state law*" and "[p]laintiffs will receive a judgment based entirely on state law whether the Ninth Circuit is affirmed or reversed on the issues raised in this petition." Resp. Brief 9-10 (italics in original). Respondents go even further now by attaching hereto a copy of the state law judgment that they will seek to have entered in the district court if petition for *certiorari* is denied or the stay of mandate is lifted. Resp. Supp. App. 3a-4a. The proposed judgment is taken directly from the alternative finding of fact. (Pet. App. 74a).

Attorneys are not required to advance every possible theory for recovery, particularly where it is undesirable from a litigation strategy standpoint.[3] In the present case, the trial court's findings support a $7.3 million judgment that leaves IBP with no viable issues to

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[2] IBP argues that Respondents "vigorously litigated the walking time issue below." IBP Supp. Brief 4. However, Respondents did so only because they could not know in advance how the Ninth Circuit would rule on their state law meal break cross-appeal.

[3] In the trial court, Respondents decided there were enough disputed legal theories and damages variables without trying to convince the trial court to split each workday into FLSA minutes and MWA minutes. Instead, plaintiffs sought – and obtained – the greater of FLSA or MWA overtime on a week-by-week basis. *See* Resp.App. 2a. Furthermore, it is too late to tell the trial court that it erred by accepting Respondents' $7.3 million state law damage figures and that new damages hearings are necessary.

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> appeal. The alternative is (a) to attempt to reopen the case for a novel damages theory not previously argued to the trial court, (b) to reprogram the damages database to count part of the workday as FLSA overtime minutes and the

other part as state overtime minutes, (c) to reopen discovery and require an evidentiary hearing, and (d) to present IBP with issues for further appeals. Even if Respondents were successful at each of the above steps, class member damages would only marginally increase.[4] IBP's analysis of the class members' best interests is flawed.

The United States has told this Court that it is "unaware of any such case" where review has been granted which will not change the relative rights of the parties in some concrete fashion. U.S. 15. Petitioner's supplemental brief offers no such cases.

IF THE PETITION IS HELD OR GRANTED, THE STAY OF THE MANDATE SHOULD BE LIFTED.

Supreme Court Rule 16 allows the Court to enter "an appropriate order" on *certiorari* petitions. Vacating a stay of mandate does not destroy this Court's power to review the lower court's judgment. *United States v. Villamonte-Marquez,* 462 U.S. 579, 581 n. 2 (1983); *Aetna Casualty Co. v. Flowers,* 330 U.S. 464, 467 (1947). In *Meredith v. Fair,* 83 S.Ct. 10, 9 L.Ed.2d 43 (1962), Justice Black vacated stays of mandate, stating:

> [T]he stays issued in this case can only work further delay and injury to movants while

[4] The overwhelming majority of the original FLSA $1.75 million overtime judgment (Resp.App.2a) is covered by the $7.3 million state law judgment, specifically overtime for meal breaks, pre-shift and post-shift work, plus double damages for meal breaks. Pet.App. 74a.

> immediate enforcement of the judgment can do no appreciable harm to the University or the other respondents. ...

The same is true herein. Respondents, the United States and the Petitioner agree that the 815 slaughterhouse workers have a right to recover $7.3 million under state law for work performed between June 1995 and May 2000.

This case has been in litigation for almost 6½ years. Public policy recognizes the "urgent nature" of the right to recover statutory minimum wages and overtime pay. *Levya v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). No legitimate purpose is served by continuing the stay of the mandate even if the petition is held or granted, because this Court retains the power to review the lower court's ruling.

CONCLUSION

The petition for a writ of *certiorari* should be denied or, if held or granted, this Court's order should lift the stay of mandate.

Respectfully submitted,

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November 10, 2004

APPENDIX A

CA Nos. 02-35042 & 02-35110

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ, VIRGINIA ALVAREZ and MARIA CHAVEZ, individually and as class representatives,

Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC., a Delaware corporation,

Defendant/Appellant/Cross-Appellee.

Cross-Appeal from the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
(District Court No. CT-98-5005-RHW)

PLAINTIFFS/APPELLEES/CROSS-APPELLANTS' BRIEF

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meal break. Weeks; accord, WAC 296-126-092(1); DLI Interpretative Guideline ES-026. (Exhibit 194, SER 279-281)

Plaintiffs agree with the District Court's meal break findings, including: "IBP never attempted to provide the employees with a 30-minute meal break," and employees were "not completely relieved from duty during their meal break." (Findings 25 & 42, ER 143 & 160)

Plaintiffs disagree with the Court's conclusion that breaks that are too short to qualify as a "meal break" or that are interrupted by work may still be partially uncompensated. (Findings 36-37, ER 154-155) The Court's conclusion was based on a misreading of DLI's guideline. (Exhibit 194, SER 279-281) This state law interpretation is subject to de novo review. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).

The Court should be reversed and judgment entered using the alternative damage findings. (Findings 37, ER 155) Under Washington law, a meal break may be unpaid only if the employee is given least 30 minutes during which he or she is completely relieved from duty.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GABRIEL ALVAREZ, et. al., Plaintiffs, v. IBP, INC., Defendant.	NO. CT-98-5005-RHW [proposed] JUDGMENT

This action having been tried before the Court, the Honorable Robert H. Whaley, United States District Judge, presiding, and having been remanded from appeal thereof;

IT IS ORDERED AND ADJUDGED:

That the Plaintiffs Gabriel Alvarez, *et al,* recover of the Defendant, IBP, Inc., the sum of $ 7,297,517, plus interest at 3.43% from September 14, 2000 to date of entry of this judgment, for damages calculated through May 14, 2000 and comprised of $ 5,487,561 in MWA overtime damages, $ 905,028 minimum wage damages, and $ 904,928 in rest break damages under Washington law;

That Plaintiffs Gabriel Alvarez, *et al,* recover of the Defendant IBP their costs of action and reasonable attorney fees and costs through December 14, 2001, as previously determined by this Court's order of December 14, 2001, in the amount of $ 1,974,394 plus interest at 2.21% from December 14, 2001 to date of entry of this judgment;

That Plaintiffs Gabriel Alvarez, et al. are directed to file a motion to establish recoverable attorney fees and costs for post- December 14, 2001 matters on a date to be determined by this Court after consultation with the parties;

That post-judgment interest accrue on all above-stated items at the rate provided by 29 U.S.C.§ 1961, ___%;

Since the damages awarded above resolve all matters having to do with plaintiffs' state law claims and that plaintiffs have represented that they will not be seeking any additional monetary damages herein regardless of the result of the resolution of the federal law claims and that final judgment will be entered when appellate proceedings are terminated, it is hereby ordered that there is no just reason for delay of entry of judgment pursuant to Fed.R.Civ.P. 54(b); and

The District Court Executive is directed to enter judgment forthwith and to provide copies to counsel.

Dated this ____ day of _____, _____

_____
ROBERT H. WHALEY
United States District Judge